The Rule of Law: An Abuser's Guide.*

Martin Krygier

I have been invited to write about abuse of the rule of law. This is not an altogether comfortable assignment, since I have long believed that the rule of law is a greatly good thing. Without it, at least in conditions of modernity, life is immeasurably worse than where it is secure. But then families are good things too, yet we know bad things can happen in families. So perhaps the rule of law has dark sides too.

This chapter explores that possibility, albeit somewhat tentatively and reluctantly. It begins by sketching an approach to the rule of law that I have elaborated elsewhere[1] and that differs from some. In particular, it does not offer, as lawyers typically do, a general definition that picks out characteristics of laws and legal institutions supposedly necessary, if not sufficient, for the rule of law to exist. Rather, it begins with teleology and ends with sociology. That is, it suggests we start by asking what we might want the rule of law for, and only then move to ask what we need in order to get it. And to answer that second question, it recommends looking beyond legal institutions to the societies in which they function, the ways they function there, and what else happens there which interacts with and affects the sway of law. For the rule of law to exist, still more to flourish and be secure, many things beside the law matter, and since societies differ in many ways, so will those things. So a universal, institution-based, answer to what the rule of law is, is implausible. And it will often mislead. Indeed it might well lead us away from the rule of law.

I then enumerate and discuss several ways in which the rule of law might be associated with abuse. I speak of verbal abuse, harms to and through the rule of law, and misuse. Though abuses are not hard to find, however, I do not think that every apparent

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1 E.g. 'The Rule of Law' *International Encyclopedia of the Social and Behavioral Sciences,* editors-in-chief Neil J. Smelser and Paul B. Bates, Elsevier Science, Oxford, 2001, vol.20, 13403-408; 'Transitional Questions about the Rule of Law: Why, What, and How?' (2001) 28, part 1, *East Central Europe/L'Europe du Centre-Est*, 1-34; 'The Grammar of Colonial Legality: Subjects, Objects and the Rule of Law,' in Geoffrey Brennan and Francis G. Castles, eds., *Australia Reshaped. Essays on 200 Years of Institutional Transformation,* Cambridge, Cambridge University Press, 2002, 220-60; 'False Dichotomies, Real Perplexities, and the Rule of Law' in András Sajó, ed., *Human Rights with Modesty. The Problem of Universalism,* Martinus Nijhoff, Leiden/Boston, 2004, 251-277.

abuse of the rule of law is rightly so called. Though named in the offence, it is often not involved in it, either as accomplice or as victim. On the other hand, there are many cases where it figures as one, the other, or both. In the course of discussion, I have something to say about what the rule of law requires to be well used, as well as what constitutes abuse of it. I also seek to dispel some misconceptions about what it is, what it depends upon and what violates it. In other terms, and in terms of my invitation, not all abuse of the rule of law shows *its* dark side. Other things are going on. But there are dark sides also, and I will discuss some of them.

1. Ends and institutions.

It would, of course, be satisfying if we could all agree what we are talking about, when our subject is the rule of law. This, however, is unlikely to happen. The meaning of the concept is so contested that any definition will be stipulative.

There is no shortage of stipulations. One of the most famous and, in the common law world, most influential was that of the English jurist, Albert Venn Dicey. He was responsible for popularising the phrase, and he took care to specify its elements. According to Dicey, the rule of law had three components:

1. 'no man is punishable ...except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.'[2]
2. 'here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'[3]
3. 'the general principles of the constitution ... are with us the result of judicial decisions determining the rights of provate persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.'[4]

This, the most influential definition of the rule of law in the common law world, is an amazing thing. Just think what it casts into the outer darkness:

1. The welfare state is out, because it gives discretion to administrators. This is something Dicey believed, and in that belief he was followed by Friedrich Hayek and others who objected to the welfare state, *inter alia,* for purportedly threatening the rule of law. We will return to this point.
2. France and the whole of the Continent are out because they have a separate scheme of administrative tribunals that deal with what they call *droit administratif.* So just dip your toe into the English Channel, and you're about to drown in a sea of unruliness.

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2 *Introduction to the Study of the Law of the Constitution,* 10th edition 1959 (first edition 1885), Macmillan, London, 188.

3 *Ibid.,* 193.

4 *Ibid,* 195-96.

3. Move to the Atlantic and you're also swamped, because Americans rely on their Constitution and Bill of Rights, not the common law, as the source of some of their fundamental legal rights.

Now a Frenchman or American might merely be bemused by their somewhat insular, and hardly unprecedented, disqualification. But if you were a Pole in 1989, or perhaps an Afghan or Iraqi today, struggling for the rule of law, this is very bad news indeed: it's not just that things are in fact hard, as everyone knows. It's as though you were barred not by mere hard facts but by ontology: your institutions are not English. Anyway it's too late because the time of the rule of law is past. Even were they to become perfectly American in their legal ways, which is likelier than English but not *very* likely, they'd still be in a very dicey situation, so to speak. No wonder that Judith Shklar somewhat heretically characterised Dicey's famous definition as an 'unfortunate outburst of Anglo-Saxon parochialism', from which the rule of law emerges 'both trivialized as the particular patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it'.[5]

But underlying and partially explaining its parochialism and formalism, there is a deeper difficulty with Dicey's definition. And this difficulty is shared with most definitions of the rule of law that one finds among lawyers and law reformers: it starts with particular institutional bits and pieces, characteristics of the way the law operates in a particular place, that you're supposed to find in a rule of law order. Many other accounts of the rule of law are even more specific than Dicey's, and mention the configurations of institutions, presence or absence of bills of rights, institutional measures to guarantee judicial independence, and particularly the formal characteristics of laws: clear, public, prospective, and so on.

I have tried to suggest another approach. The argument has been modified slightly along the way, but this, very briefly, is where it stands at the moment. To try to capture this elusive phenomenon by focussing on characteristics of laws and legal institutions is, I believe, to start in the wrong place and move in the wrong direction. Yet this is how many lawyers,[6] and even more the many international and local legal advisers seeking to

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5 'Political Theory and the Rule of Law', in *Political Theory and Political Thinkers,* Chicago, University of Chicago Press, 1998, 26.

6 In an article I find otherwise extremely congenial, for it also commends an ends-oriented rather than institution-focused approach to understanding the rule of law, Rachel Kleinfeld Belton suggests that institutional approaches are favored predominantly by 'practitioners working to build the rule of law abroad'. The reason she gives is that '[f]ew modern rule-of-law reform practitioners sat down and enjoyed a disquisition on classical rule-of-law conceptions before taking up their jobs; their efforts were developed in the heat of battle, as authoritarianism was pushed back, Communism fell, and countries had immediate needs for functioning economies, governments, and societies. In response to these unprecedented demands, aid agencies and their hastily employed lawyers tried to get a handle on the massive new undertaking by breaking the concept down into the concrete institutions that needed reforming'. ('Competing Definitions of the Rule of Law. Implications for Practitioners', Carnegie Papers, Number 55, January 2005), 6. This seems a plausible account of the people to whom it refers, but Dicey was not one of them. Nor were the generations of lawyers influenced by him, nor those who begin as Lon Fuller did at a higher level of abstraction and with greater subtlety, with some account of the 'internal morality of law' as the key ingredient of the rule of law (see Fuller's *The Morality of Law,* Yale University Press, New Jersey, 1969). I suspect that the distinction maps that between non-lawyer

'build' the rule of law, do start. Beginning with some profile of the specific attributes of rule of law forms of rules and institutions, however, we run the risk of mistaking contingent means for abiding ends. I would recommend that we start instead by asking: what's the *point* of the rule of law, what's the problem to which it's the supposed solution? And this is not just a semantic point. We get more deeply into why the rule of law might matter and what needs to be achieved for it to exist, if we come at it *teleologically*, by asking what it is for, by seeking in the first place to understand its animating values and purposes. Such values and purposes should *inform* institutional design, but they cannot universally or in detail, still less universally *and* in detail, determine its form. Consequently they might be, and in fact have been, pursued and achieved in a variety of ways.

So, rather than ask in the first instance what characteristics the rule of law as we know it has, and measure the world's legal orders in the light of their presence or absence, we do better to ask what the distinctive values are that underlie and justify the rule of law, and – if they commend themselves to us - then asking in different contexts, at different times: can these values be instantiated here or there, and if so, how can they be? The answers to those questions will inevitably vary, we will frequently be uncertain about them, and so they are unlikely to travel as far as the values that inform them, but that does not mean that those values are simple parochial prejudices.

In particular I propose the following three questions, asked in the following order, to get a handle on the rule of law, why it matters and how it might be abused. First, and before getting to institutional details as lawyers too often and too quickly do, we should ask: what's the point of it? Then, what conditions do institutions need to fulfil to help you make the point? Third, what particular institutional measures best fulfil these conditions, in particular circumstances, with particular institutions, cultures, histories, *etc.* in place?

Not only is it important to ask these questions, but so too to ask them in that order. In particular, to keep the first in mind, and return to it, whenever one is considering the second and third, for they only take on significance in the light of it. We can generalize most confidently at the first level, less so at the second, least so at the third. That is simply, as thinkers at least since Aquinas[7] have insisted, a fact about how one institutionalizes general values, by concretising them in various ways, in differing circumstances, within different communities, traditions, institutions, and so on. It is not a debunking of the rule of law as a value, and in particular not of its worth.

Starting at the top, then, the rule of law is commonly understood by contrast, and the contrast most often made is with arbitrary exercise of power. That, above all, is the evil that the rule of law is supposed to curb. The concept, though not always the specific verbal formulation, embodies ideals that have been central to political and constitutional

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philosophers and lawyers (whether theorists or practitioners), with the first more concerned with ends and the second with means, as much as it does those who are not and those who are 'caught in the heat of battle'. It's just that there are more lawyers in that battle than philosophers, perhaps with good reason, but not necessarily in this case.

7 As to whom, see John Finnis, *Natural Law and Natural Rights,* Clarendon Press, Oxford, 1980, 284-89.

discourse at least since Aristotle, who contrasted 'the rule of the law' with 'that of any individual'.

The implication is that we do well to institutionalise ways of curbing arbitrariness in the exercise of power, and the hope is that law can be among those ways, that it should contribute in salutary, some say indispensable, ways to channeling, constraining, disciplining and informing – not merely serving - the exercise of power, particularly public power. There are many other things law can do and does, but it is in serving these aims that it serves the rule of law.

Two reasons, richly elaborated in rule of law writings, for seeking to curb arbitrariness with the aid of law are the fear of oppression, and the uses of stable, reliable and mutually comprehensible cues for social orientation and co-ordination. The rule of law seeks to lessen reasonable fear, on the one hand, and facilitate fruitful interaction on the other. Hobbes and Locke combined to deal with the former, and Judith Shklar revisited it in enunciating her 'liberalism of fear.'[8] Smith and Hayek wrote about the latter, as the special predicament of a member of a 'civilized' society, who 'stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons.'[9] What is needed is 'a basis for legitimate expectations',[10] without which the 'co-operation and assistance of great multitudes' will necessarily be a more chancy affair.

I take these to be very general values that respond to general human needs. It is true, though, and insufficiently noticed in my earlier elaborations of these reasons, that they may well spawn differences among the more specific purposes that matter to partisans, eg, restraint on power in the case of fear, predictable exercise of power in the case of co-ordination. So even at the level of ends, there is room for considerable disagreement,[11] though opposition to arbitrary exercise of power seems to me common to most plausible candidates.

That opposition leads naturally to a concern with institutions. Thinkers of a fearful disposition are reluctant to leave too much in matters of state to individuals' propensity for virtue, or other good traits. They believe that in public affairs, while we might (or might not) want to *encourage* individual virtue, for example, we would be unwise to *rely* upon it, and certainly to rely solely upon it. And those who are more concerned with ridding us of confusion than of fear, also have reason to look to

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8 Cf Judith Shklar, 'The Liberalism of Fear, in Nancy L. Rosenblum, ed., *Liberalism and the Moral Life,* Harvard University Press, Cambridge Mass., 1984 and 'Political Theory and the Rule of Law', in Shklar, *Political Thought and Political Thinkers,* edited by Stanley Hoffmann, University of Chicago Press, Chicago, 1998,. I have tried to explore some implications of the liberalism of fear in 'Ethical Positivism and the Liberalism of Fear,' in Tom D. Campbell and Jeffrey Goldsworthy, eds., *Judicial Power, Democracy and Legal Positivism,* Dartmouth, Aldershot, 1999, 59-86.

9 *An Inquiry into the Nature and Causes of the Wealth of Nations,* Liberty fund, Indianapolis, vol. I, Indianapolis, 1981, 26.

10 John Rawls, *A Theory of Justice,* Harvard University Press, Cambridge, Mass., 1971, 238.

11 One could go further here, but I won't in this article. I have recently been stimulated to think about the potential plurality of ends by two recent contributions: Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory,* Cambridge, Cambridge University Press, 2004, and Rachel Kleinfeld Belton, *op. cit.*

institutions. In plural societies, stable and reliable *signals* and signals that are matters of common knowledge, are preconditions for foreseeability and coordination.

If institutions are to contribute to attainment of the purposes of the rule of law, and this is my second level, there are certain conditions they must fulfil, which can be stated with a fairly high degree of generality and which I have tried to sort out at some length elsewhere.[12] Briefly, the institutions have to have sufficient *scope;* knowable and understandable *character; administration* coherent with the announced rules, but above all, they have to *count* as a source of restraint and a normative resource usable and used in social life. Not all law in all places counts in these ways. What it means for law to count is an extraordinarily complex matter, or range of matters. What contributes to making law count, or not count, in turn, will vary in different societies, within them, and at different times. And this is not simply because legal institutions vary, but because their effectiveness depends upon so many social, non-legal elements of social organization and practice, and they vary even more.

Thirdly then, we come to the place lawyers commonly start: what particular institutions, arrangements and practices best help in the fulfilment of such conditions? That is not at all obvious, and the answer will differ in different circumstances, where sources of arbitrariness differ, and social and institutional resources differ too. *A priori* the ways might seem infinite, and certainly they are many, but in practice some can be ruled out pretty swiftly, and others less swiftly but with considerable confidence, since there has been a lot of serious thought and long experience in relation to these matters. Giving all power to a single ruler has been found not to be useful, and that is not all we have learnt. So the repertoire diminishes and takes on particular themes and insights, but it is parochial folly to imagine a specific *recipe* or ostensive definition coming out of this. This is not because there is nothing to know in this field, but because in different societies there are different things we need to know to complete the task.[13]

Especially since, if one keeps the goals in mind, one might find that familiar institutions work differently in foreign parts, and foreigners have ways of achieving comparable ends with different means. Perhaps other than legal institutions can do what we have hoped the law might do. And even if you conclude that legal institutions of certain kinds are necessary to achieve such ends, they will never be sufficient. The institutions, to repeat, have to *count* in social life, and what makes law count, still more what makes it count as a restraint on arbitrary power, is one of the deepest mysteries of the rule of law, and it does not just depend on the law. For what ultimately matters is how the law affects those to whom it is *directed*, not how, or the particular forms in which, it is *sent*. We, lawyers especially, know a lot about the latter but much less than we imagine about the former. Yet how it affects them has something to do with *them,* not just *it,* and if no one is listening, or they prefer listening to other things, it doesn't matter too much what the law is saying. What we need, and what we don't have at any level that would combine generality and institutional specificity, is a political sociology of the rule of law. But only with that will we be able to say with any confidence, though still not in one-

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12 I deal with these at some length in, particularly, 'Transitional Questions ...', 'The Grammar of Colonial Legality' and 'False Dichotomies ...'

13 Though, as Arthur Glass reminded me on reading this passage, there is a rabbinical saying of peculiar aptness here: 'it is not for you to complete the task, but nor are you free to desist from it.'

size-fits-all terms, how to instantiate it. In the meantime, however, we can try to discern how deeply, comprehensively, enduringly, the ends of the rule of law have been achieved here and there, and why. And, since abuse is often easier to detect than fulfilment, we can also point to some ways it can be abused.

2. Abuse

'Abuse' is a tricky word. It can mean insult, deride, pour scorn, as when football fans abuse referees. So if I say the rule of law is full of shit, as some do, I am abusing it. But there are other ways it can be abused, too. Abusive *harm* can occur without any scornful utterance at all. Whatever he actually *did*, one guesses that Michael Jackson's words were sweet as honey. And things can be *misused*, put to ill purpose, as power is often abused. Fundamental rights, often dripping with pious rhetoric, can be abused in this sense, and the rule of law too. That can harm rights and the rule of law themselves. Whether or not it does that, it can harm us or other things that matter to us. In the first case, we might speak of abuse *to* the rule of law. In the second, of abuse *through* it. And one last complication, which can occur in any of the former sorts of abuse: the rule of law might be directly involved in abuse, but it might also, though quite without complicity, nevertheless be invoked, perhaps to legitimise abusive practices. In such a case, its name will have been taken in vain, but will still have lent itself to abuse.

Insult, harm, misuse; to, through; directly, by invocation. The rule of law has suffered them all and arguably been complicit in some of them, but not always at the same time, in the same ways. There is some point in disaggregating these ways. There are some abuses to which the rule of law contributes, others which it innocently legitimises, still others where it is just the fall guy. It makes a differerence which. I begin with verbal abuses, then move on to harms and misuse. I will also try to distinguish circumstances in which the rule of law is an innocent party in the abuse concerned, from those where its complicity is more arrguable. My examples are merely illustrative. There are plenty more.

3. Words and things

The rule of law has often been derided. Marxists and others of radical temper used to do it all the time. Many rulers, too, have had no time for the rule of law, and have not been shy to say so, from Max Weber's charismatics ('it is written but *I* say unto you') to decidedly uncharismatic late-communist parties, that wrote their 'leading role' into constitutions, and tried to chisel it, in both senses of the word and ultimately unsuccessfully, into everyday life. But these days, when states abuse the rule of law, they more commonly harm and misuse it even while speaking well of it. Indeed, typically, state abuse of the rule of law – harm done to it, misuse of it - *depends upon* their speaking well, not abusively, about it. That is no accident.

For just as democracy, justice, peace, and many other good things are honorifics, hurrah words, so today the rule of law is an honorific phrase. Once upon a time, indeed most of the time, 'democracy' was not an honorific at all. But times have changed for democracy. Similarly with the rule of law. Though Fareed Zakaria laments that we have come to place our bets on democracy rather than the rule of law,[14] in fact a lot of money

[14] *The Future of Freedom,* W.W. Norton & Co., NY, 2003.

is on the rule of law. Long marginalised in theories of development, the rule of law is now at their core.[15] A scarcely noticed cliché with little resonance in the imperious rhetoric of human rights, it now is offered up as the key to achievement of those rights.[16] Again, in post-communist societies, as Ivan Krastev observes, whereas '[c]orruption is the black myth of transition ... the explanation of last resort for all failures and disappointments of the first post-communist decade ... [r]ule of law is the white myth of transition. After some years of flirting with the ideas of democracy and market economy, now rule of law is the magic phrase in Eastern Europe. It is rule of law and not democracy that brings foreign investors, it is rule of law that secures development and protects rights. It is the lack of rule of law that explains the spread of corruption and it is the march of rule of law that will guarantee success in the fight against corruption.'[17] Indeed, as Frank Upham remarks, 'It is difficult to find anyone, whether in government, foundations, corporations, or universities, who does not favor encouraging the rule of law in virtually every country and society.'[18] And where the rhetoric goes, the money follows: rule of law packages are standard, central and pricey elements of international aid to benighted countries.

Once a concept has acquired such an aura, it will be invoked. Nothing surer. If it is invoked when abuses are occurring we might be misled to think of it as the culprit in abuse, even though it might be a victim, or maybe just an alibi, not even near the scene of the crime. And apart from deliberate abusers, it might draw bands of acolytes, whose enthusiasm for it is not matched by an understanding either of what it depends upon or of what it can be expected to offer. All this has happened to the rule of law.

3.1. Masquerades

Imagine a contemporary ruler boasting, as Lenin did, that his rule was 'based directly upon force, and unrestricted by any laws. The revolutionary dictatorship of the proletariat is power won and maintained by the violence of the proletariat against the bourgeouisie, power that is unrestricted by any laws.'[19] That, of course, well describes the way any number of contemporary rulers actually behave, but you won't hear that from them. Presumably this is to help their reputations, which it might. But it doesn't do much for the reputation of the rule of law.

Rulers do many bad things, often parading them under the mantle of the rule of law. Stalin's 1936 Constitution had a sparkling bill of rights, designed by a commission the deputy chairman of which was the jurist Evgenii Pashukanis – who actually did know something about the rule of law, though he rejected it - and that included Bukharin and Radek. Like millions of others, however, they did not reap the benefits of those rights.

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15 See Thomas C. Heller, 'An Immodest Postscript' in Erik G. Jensen and Thomas C. Heller, eds.,, *Beyond Common Knowledge. Empirical Approaches to the Rule of Law,* Stanford Law and Politics, Stanford, California, 2003, 385ff.

16 Randall P. Peerenboom, 'Human Rights and Rule of Law: What's the Relationship' 2005 UCLA Public Law Series, http://repositories.cdlib.org/uclalaw/plltwps/5-21.

17 'Corruption, Anti-Corruption Sentiments, and the Rule of Law', in Adam Czarnota, Martin Krygier, and Wojciech Sadurski, eds., *Rethinking the Rule of Law after Communism,* Central European University Press, 2005, 323.

18 Frank K. Upham, 'The Illusory Promise of the Rule of Law, in András Sajó, ed., *Human Rights with Modesty. The Problem of Universalism,* 279-313 at 280.

19 *The Proletarian Revolution and Renegade Kautsky,'* (1918, translation 1934) 19.

Pashukanis was arrested and disappeared in 1937. After elaborate show trials, for their fantasy parts in which they were carefully coached and tortured, Bukharin was liquidated in 1938, and Radek killed in a labour camp in 1939. The trials were symbols of the rejection by Stalin of Pashukanis' 'legal nihilism' and the inauguration of the era of 'Soviet state and law'. Such pretences in the name of the rule of law, in the course of its abuse, are easily and rightly criticised. But if such abuses occur in the name of the rule of law, that is scarcely *its* fault.

This is not merely a semantic point. For to talk of 'the dark side of fundamental rights' is to suggest the problem inheres in the rights themselves, or in the case of my subject the rule of law itself. And that may often be true. But equally often the abuse flows not from inherent characteristics of the value in question, but from its rhetorical status. It is important, in resisting rhetorical overkill, not to blame its victim, lest something precious be lost.

One example will do. In 1969, Professor Adam Łopatka, later President of the last communist Polish Supreme Court, explained:

> The rule of law, like every important phenomenon of social life, has a distinctly class character. That is why it is necessary to distinguish sharply between socialist rule of law - our rule of law - and bourgeois law. Socialist rule of law represents a higher, more perfect level of the development of the rule of law.[20]

This exposition occurred the year after the brutal suppression of protests at Warsaw University, a government-led anti-semitic campaign which culminated in the forced exile of several thousand Jews, and the Soviet invasion - with fraternal assistance - of Czechoslovakia. Not a good year for the socialist rule of law. And yet this sort of fraudulent misappropriation can happen to any good name. All you need is the right adjective. Here the rule of law is insulted, but it is not misused, for it is not used at all. Or rather it is the *concept* that is abused, not the thing itself, for the thing in this case is absent. A similar maneouvre was well observed by a character in Aldous Huxley's *Eyeless in Gaza*:

> 'But if you w-want to be f-free, you've g-got to be a p-prisoner. It's the c-condition of freedom – t-true freedom'.
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> 'True freedom!' Anthony repeated in the parody of a clerical voice 'I always love that kind of argument. The contrary of a thing isn't the contrary: oh dear me, no! It's the thing itself, but as it *truly* is. Ask a diehard what conservatism is: he'll tell you it's *true* socialism. And the brewers' trade papers: they're full of articles about the beauty of True Temperance. Ordinary temperance is just gross refusal to drink; but *true* temperance, *true* temperance is something much more refined. True temperance is a bottle of claret with each meal and three double whiskies after dinner. Personally, I'm all for true temperance, because I hate temperance. But I like being free. So I won't have anything to do with true freedom. ... 'What's in a name?' Anthony went on. 'The answer is, practically everything, if

[20] 'Pojęcie praworządności' [Conceptions of the Rule of Law] in Łopatka ed., *Podstawowe Prawa i Obowiązki Obywateli PRL* [Fundamental Rights and Duties of Citizens of the Polish People's Republic], Warsaw, 1969, 16.

> the name's a good one ... The name counts more with most people than the thing. They'll follow the man who repeats it and in the loudest voice. ...[21]

Where the power in the land is exercised arbitrarily, when law does nothing to reduce potential fears, nothing or nothing much to help co-ordinate action, when its procedures are unfair, when the values of legality are traduced, rulers might still trumpet what they do as true service of the rule of law. So too, legal institutions, courts, trials, judges, verdicts, can all be employed in ways that dress up the apparent ruliness of practices which in essence follow pre-determined scripts, or at least patterns that have nothing to do with treating people fairly and in non-arbitrary ways. The perceived legitimacy of such regimes and practices may well be served by such pretences of lawfulness. And, to be sure, like hypocrisy, such behaviour is some sort of tribute from vice to virtue, but like hypocrisy, you'd better not believe it.

3.2. 'trop de zèle'[22]

The rule of law suffers from other tributes, apart from hypocrisy. One is excessive but misplaced enthusiasm. Again it is worth distinguishing between faults properly attributable to the rule of law itself and those that flow from something else, in this case too much zeal for it.

Thus, in a recent article,[23] Randall Peerenboom questions the relationship between the rule of law and human rights. So many partisans of the rule of law, Peerenboom argues, see it as a panacea that should be thrust on potential beneficiaries wherever they can be found, whether or not it does them much good, whether or not they want it, whether or not they agree with 'its' promoters what 'it' is. They don't recognise that others can disagree, that other values compete, that the contributions of the rule of law to human welfare are equivocal and not all established, that in different contexts different institutional mixes might be appropriate, and that there are many contexts – international, transitional, failed-states – where conditions for effective rule of law don't exist, and where appeals to the rule of law do little good and can do harm.

Peerenboom's article assembles a remarkable array of occasions where advocates of the rule of law display much *hubris* and no humility, and a remarkable assortment of good reasons for them to do the opposite.[24] So many, indeed, that sometimes a partisan of the rule of law might feel he should be not merely humble, but ashamed of his attachment to a notion, which has led to so many sad, imperialistic and nosy ventures into other people's business. Particularly if he is among those who 'hold out unrealistic hopes that rule of law will somehow magically settle deeply contested rights issues or put an end to war, poverty, political stability [sic] and the other factors that are the main causes of human rights violations in the world'.[25] But, though you cannot be told too often to be humble, it is not clear how much the lack of humility of its partisans can be blamed on the rule of law.

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21 Penguin, Harmondsworth, 78.

22 The source of course is Talleyrand's advice to diplomats: 'Surtout pas trop de zèle'.

23 'Human Rights and Rule of Law: What's the Relationship?', (2005) 36 *Georgetown Journal of International Law,* 809-945.

24 Frank Upham assembles more of the same. See 'The Illusory Promise of the Rule of Law,' *op. cit.*

25 *Op. cit.,* 944.

For much of the complaint has to do, not so much with the rule of law *per se*, but with misguided, excessive, claims made for it.[26] Peerenboom's real worries are that the rule of law, quite good in itself, has been hijacked, pushed too far or into the wrong places, at the wrong times, for the wrong purposes, by the wrong people. And sometimes it is not even the rule of law at all which turns out to be at fault, but the pretence of it, when conditions necessary for it are absent.[27] But that is not necessarily the fault of the rule of law *per se*, but of exaggerated expectations of what institutions can deliver, and of the ways in which the term is used rhetorically to displace real matters of uncertainty and debate with an all-and-nothing explaining and glorifying epithet.

Every all-purpose, one-size-fits-all nostrum to the world's problems will suffer the same fate, not necessarily because there is anything wrong with *it* but because, once touted as a single all-purpose cure, it must fail. We have no such cures. Some values, after all, are at the same time modest in scope but precious all the same. If you ignore their modesty, you debase their worth.

There is nothing special about the rule of law in this. In an earlier collection in this series,[28], many of the same points about rhetorical overreach, excessive ambitions and imperialistic design are made about that, also modish and also valuable, concept. I have begun compiling a compendium of the ways that human rights discourse goes awry: so far I have drawn on philosophical explications of hot air, humbug, sermonizing, moralism and bullshit.[29] But there are others. And there is no important value or cluster of values about which such points could not be made. At one point, Peerenboom comments that 'surely it is worrisome when both sides appeal to rule of law to justify their actions',[30] but if so, it is just the same worry that might occur whenever anyone invokes human rights, democracy, justice, and so many of our 'essentially contested' hurrah words. And yet each of these concepts names values we do well to serve.

3..3. Goal displacement

But how should we serve them? One reason for my suspicion of accounts of the rule of law that start with means rather than ends, is that they are prone to a well-

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26 Indeed, though his endorsement is somewhat muffled by the litany of criticisms with which it is surrounded, Peerenboom does remind us that 'on the whole, rule of law is desirable. What is often problematic is not the principles of rule of law but the failure to abide by them. However, rule of law is clearly no panacea for any of the problems surveyed in this Article and is more useful in addressing some concerns than others. There is a great danger in promising too much in the name of rule of law, lest the extravagant promises result in disillusionment and a backlash, which is likely to happen if rule of law is conflated with justice and all things good and wonderful ...' (939)

27 'But we should not be unduly dismissive of rule of law either. Many of the problems discussed herein are the result of failure to abide by the principles of rule of law or to devote adequate resources to legal reforms, economic development and nation-building efforts ... It is indeed striking that while critics in many developed countries have the luxury of belittling the concept of the rule of law, those who have had the misfortune to suffer its absence appreciate its virtues and count among its biggest supporters.' (944-45) Striking indeed.

28 András Sajó, ed., *Human Rights with Modesty. The Problem of Universalism,* Martinus Nijhoff, Leiden/Boston, 2004.

29 Martin Krygier, 'Human Rights and a Humanist Social Science,' in Christopher L. Eisgruber, and András Sajó, eds., *Global Justice and the Bulwarks of Localism,* Martinus Nijhoff, Leiden/Boston, 2005, at n.139, p. 81.

30 *Op. cit.,* 931.

remarked organizational pathology, namely, goal displacement. This occurs, simply put, when means are substituted for ends, often unconsciously, and people flap about with check lists (and cheque books) and recipes, 'off-the-shelf blueprints',[31] often modelled on alien and distant originals, quite forgetting the purpose(s) of their enterprise. This has often happened with the rule of law, when particular institutions and institutional forms are taken to represent it, and focus becomes fixed on those institutions rather than the ends that, sometimes in a dimly remembered or clearly forgotten past, had inspired the development of those institutions. I have discussed this elsewhere in general terms[32] and Rachel Belton has recently assembled many examples.[33] As Jensen and Heller point out:

> In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform.* Basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector.
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> ... During the last seven years, we have witnessed an explosion of literature related to legal and judicial reform. Yet very little attention has been paid to the widening gap between theory and practice, or to the disconnection between stated project goals and objectives and the actual activities supported.[34]

It might turn out that rule of law values are better served by building the economy than courthouses; certainly there seems to be a strong correlation between wealth and the rule of law. *A priori*, anything may turn out. However rule of law 'packages' get their focus less from rigorous attempts to close such theoretically open possibilities than from assumptions, often false but fervently believed by lawyers (including lawyers who stand to benefit from them), about the legal-institutional sources and resources of the rule of law, and, needless to say, the importance of increasing and improving them.

Worse, perhaps, than forgetting the point of the reforms is actually undermining it, as Rachel Belton suggests often happens:

> Depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant "improvement" of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal

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31 W. Jacoby, 'Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe', *East European Constitutional Review* Vol. 8 No. 2 (1999) p. 62.

32 'False Dichotomies, Real Perplexities and the Rule of Law', in Sajó, ed., *op.cit.,* 256.

33 *Op.cit., passim.*

34 Erik G. Jensen and Thomas C. Heller, eds., *Beyond Common Knowledge. Empirical Approaches to the Rule of Law,* Stanford Law and Politics, 2003, 1-2.

> environment. An end good of the rule of law – a stable, predictable legal system – has been undermined by the so-called reform process.[35]

Combine goal displacement with excessive zeal, and one confronts Frank Upham's fear of:

> The likelihood that Western mischaracterization of the appropriate roles of law will be accepted by developing countries, thus leading to misallocation of domestic effort and attention, and perhaps most important, eventually to deep disillusionment with the potential of law. When the revision of the criminal code does not prevent warlords from creating havoc in Afghanistan and the training of Chinese judges by American law professors does not prevent the detention of political dissidents – or, perversely, enables judges to provide plausible legal reasons for their detention – political leaders on all sides may turn away from law completely and miss the modest role that law can play in political and economic development.[36]

Upham's point is well taken even if, as is typical, he identifies the rule of law, rather than an inadequate approach to it, as the source of his fears. Better said, when legal institutional tinkering fails to prevent havoc, it has failed to produce the rule of law, and commonly that should not have been a surprise. And yet, not just disappointed political leaders, but also misdirected critics, are liable to send the bill to the rule of law, even though it had never visited that address.

There is nothing necessarily malevolent in goal displacement. Yet it can give a good thing a bad name, simultaneously to talk it up and identify it with, pour money into, and end up disappointed by, institutions that might do nothing much to help achieve it. Here again, the rule of law takes the rap, when it might scarcely even have been engaged.

4. Harms

4.1. Harms to ...

It would be naive and implausible to believe that the rule of law is only abused by hypocrites, misplaced enthusiasts, and those who mistake means by which we seek to institutionalise the rule of law for the thing itself. Some abuses lie closer to home.

As with many good but complex and rare achievements, the rule of law is more easily harmed than helped. And now that the rule of law is in vogue, we have more than a few examples of help that allegedly harms, kindness that kills, or at least injures. Sometimes it seems as though killing the rule of law might have been the point of the exercise, but often it is simply a result of our ignorance, since we don't know what helps. On the other hand, we do not always know what harms either, and some alleged harms may not be.

I take three contexts: one, that of post-dictatorial transitions, where some proposals supposed to serve the rule of law arguably harm it; another, the welfare state, where it has been alleged that harm to it has flown from the use of law for purposes and in ways that corrupt the rule of law, but I doubt that the case has been made out; the third,

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35 *Op. cit.,* 20.

36 *Op. cit.,* 281.

the war on terror, where it is not only terrorists who might end up as victims. The contexts are purely illustrative. They do, however, expose what might be involved in saying that the law can suffer from well-intentioned, sometimes self-inflicted, harm. They also raise some general issues of what the rule of law might require in different, often difficult, circumstances.

4.1. Transitions

It is pretty clear that many institutions which work one way in one place cannot be relied upon to work similarly everywhere. They may indeed turn out to be counter-productive. Thus, discussing attempts to 'root out corruption' in post-communist countries, András Sajó observes:

> Where the cabinet is endowed with its own anti-corruption police, that police will investigate those whom the majority in the cabinet dislike. The rule of law will be stabbed in the back by a partisan and arbitrary knife, although the use of that knife was originally authorized to protect the rule of law.
>
> At the moment, however, corruption and governmental indecency go unpunished everywhere in eastern Europe and precisely in the name of the rule of law.[37]

Again, one of the most often touted conditions of the rule of law is judicial independence. In post-communist countries, used as they had been to 'telephone law' and sundry other forms of political interference, it seemed to many well-wishers that a key to the rule of law was a largely untouchable judiciary. And in many countries there have been decisive moves in that direction. Not all of them have served the ends of the rule of law. One difficulty is that measures designed to enhance institutional autonomy, or at least justified in those terms, might well shield incompetence, political affiliations and corruption. Thus several post-communist countries, among them Poland, quickly institutionalized complete judicial independence from outside interference, as though their ideal of having a substantively autonomous judiciary would best be reached by imagining it had already been attained. That has made immovable old, incompetent, corrupt, badly-formed hold-overs from earlier times. In Bulgaria and most likely elsewhere as well, it seems clear that the same measure – rendering judges irremovable - was actually *intended,* by the first unrenovated ex-communist leaders, to have that result so that if they lost electorally, they would still have their people on the bench.[38]

It might have been better to sack or not re-appoint existing judges and appoint an independent commission to re-hire, including such members of the former cadres as qualified, as was done with the Polish Supreme Court (but not the wider judiciary). This way one would not be assuming what still needed to be proved, that judges shielded from sacking would perform their tasks in competent, independent, and substantively autonomous ways. However, this strategy brings with it a further danger, since if, as in Croatia under Tuđman, the appointment committee is not in truth independent this is another way to bring new political appointees with tenure into the judiciary. So, not only the judges but also those who appoint them should combine competence with impartiality

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[37] András Sajó, 'Corruption, Clientelism, and the Future of the Constitutional State in Eastern Europe', Spring 1998) 7, 2 *East European Constitutional Review* 37-46.

[38] See Pedro Magalhães, 'The Politics of Judicial Reform in Eastern Europe', (October 1999) 32, 1 *Comparative Politics,* 43-62.

and institutional security. Candidates with such a combination of qualities do not grow on trees.

A third example is raised by Adam Czarnota, who argues that too eager an embrace of a formalist understanding of the rule of law has abetted the development of a peculiar 'functional' type of corruption in post-communist societies, that:

> Too early and narrow interpretation of the 'democratic law-governed state' principle allows old networks smoothly to embrace the new reality and in some time control that new reality. In other words rule of law has been functional in creation of the double character of the transformation. It works to give legitimacy to the new regime and at the same time its narrow interpretation allows abuse of the new institutions and rules by the hidden networks of interests.
>
> The noble principle which was supposed to regulate the operation of the political system was turned into its opposite.[39]

These examples again raise the distinction between the values of the rule of law and what we imagine to be necessary vessels for them. Independence of the judiciary, even if it can be secured, does not necessarily deliver impartial law enforcement, which is one of the things we hope to gain from the rule of law. The former might be necessary for the latter, but it is often insufficient. For 'the lines of conflict do not necessarily juxtapose legislatures and courts. ... Even if the courts are independent, they need not be impartial.'[40]

There is a larger point, or at least dilemma, here. It is an open question, at least an arguable matter, whether the best way to establish particular values is to act in accordance with them from the start, particularly when the circumstances with which you start are uncongenial to them and the job is to establish and institutionalise them, often for the first time. Of course it is intutively and morally appealing to think so, and we have a terrible counter-example to concentrate our minds – a monopolistic socialist state supposed to pave the way for the 'withering away of state and law'. One has to be profoundly suspicious of any such 'transitional' recommendations to use the opposite of what you want to achieve, in order to achieve it. And yet wars have been fought to secure peace, and austerity practised to generate plenty, so we cannot say that it is always right to behave as you would ultimately want everyone to.

Even if one decides that values are ultimately better served by being served all along, another question arises: is the best way of achieving such values to mimic institutions found in well-established rule of law states, or are 'transitional' institutional forms to be sought, tolerated or even encouraged?

I have no confident solutions to these dilemmas, particularly no comprehensive and few concrete ones, but I do have a piece of advice: try to avoid being impaled on

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39 Adam Czarnota, 'Political corruption and the law-governed post-communist state. On two dimensions of post-communist transformation and the rule of (bad) law,' forthcoming in Leslie Holmes, ed., *Corruption and Terrorism,* Edward Elgar, London, 2006.

40 José María Maravall and Adam Przeworski, 'Introduction' to *Democracy and the Rule of Law,* Cambridge, Cambridge University Press, 2003, 14. For examples of independent but partial judiciaries, see Maravall, 'Rule of Law as a Political Weapon', *op. cit.,* 261-301.

either sharp, protruding, horn. That is not easy. The literature on 'rule of law in transition' is littered with set-piece debates between supporters of what Wojciech Sadurski, with some irony (since he favours them), calls 'simplistic' theories, on the one hand, and 'fancy' theories on the other.[41] The former take phenomena such as democracy, the rule of law, constitutionalism, to have settled meanings and manifestations and tend to judge local developments in the light of existing models believed to have been successful elsewhere. The latter insist that post-dictatorial transitions involve social, political, and legal transformations which have unprecedented, *sui generis*, aspects, which cannot be captured in the simple identikit portraits we have inherited of what law, the rule of law, and constitutionalism should be like. In the most sustained fancy theory, that of Ruti Teitel, we are advised to recognise that 'in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.'[42]

Both theories contain insights, since, as I have tried to show, universal and particular mix and must mix in the rule of law. However either extreme can lead to abuse of the rule of law. At one end, perhaps only a caricature, one would need to know nothing about the particular society undergoing transition. Rather one would search for models of 'international best practice' and pack them for export – to anywhere. Of course, no one quite says this, but many attempts to transplant institutions, practices, laws, have foundered on unanticipated difficulties when the graftee of a transplant seems less hospitable to it than the grafter had been. The other extreme would forsake purported lessons, general prescriptions, precedent and experience, and go native. That not only limits one's repertoire of possibility needlessly, and risks time-consuming reinvention of well-worn wheels, but it also makes it hard to know when purposes are achieved or criticism is appropriate. For where would standards of appraisal or criticism come from in a world of truly *sui generis* events?

Interesting views occupy neither of these extreme positions, of course, but many are palpably pulled towards one or other of them. Torn between advice to do just as one's betters have done so well for so long, on the one hand, and what is uniquely required in a particular time and place, on the other, it is not surprising that transitional rule-of-lawyers are confused, and the transitional rule of law tends to be abused, in every sense.

4.1.2. Instrumentalisation

If the attempt to *compose* the rule of law evokes certain kinds of abuses, it has also been alleged that, in countries acknowledged to have enjoyed it, it has been subject to serious decomposition without anyone quite intending that to happen. Thus it was common in the 1970s and 1980s to lament (or welcome) the instrumentalisation of law by the welfare state as spelling the decline, if not death of the rule of law. The reason proffered was that bureaucratic regulation in particular, and modern legislation also, were

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41 Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories,' in Adam Czarnota, Martin Krygier and Wojciech Sadurski, eds., *op. cit.,* 9-24.

42 *Transitional Justice,* Oxford University Press, New York, 2000, 6.

losing the formal characteristics associated with the rule of law: clarity, publicity, generality, and so on.[43]

Living in a welfare state and interested in dictatorial states that specialise in instrumentalising law, I have always been puzzled by this suggestion. For while we know that a totally or even predominantly instrumentalised law, as advocated by Pashukanis and achieved by Stalin, is a terrible thing, it is not obvious that partial instrumentalisation in a legal order with strong long-lived institutions, traditions, professions, conventions and expectations, a rich culture of lawfulness, and a lot of uninstrumentalised law left in the mix, is the same thing or even a step on the road to the end of the rule of law. Certainly, that is not the way the rule of law has historically come to an end, where it has done so. To the extent that writers such as Hayek and Kamenka and Tay objected to the welfare state on the grounds of its inevitable corrosion of the rule of law, their objection seems to me ill-founded. As do attempts to roll back the welfare state on such grounds. There might be other grounds, but they are not my concern here.

Here too there are some general issues involved. One is that the rule of law, properly conceived, offers us tolerable threshold conditions, not total security or foreseeabililty. That is to say, what people need from the rule of law (together with other things), and what successful institutionalisation of it can help provide, is, first, an adequate shield against the worst sorts of fears, uncertainties and surprises that arbitrarily exercised power can produce and, second, adequate and commonly interpretable cues by which strangers can orient their behaviour and interact with some confidence and mutual understanding. Without such a shield and such cues, life can be intolerable. But nothing can protect us against all surprises, since there are so many that the law cannot control. Nor should we hope for such security, for that would be the life of a prisoner not a free citizen. So we must recognise that more rule of law, above threshold levels, is not necessarily better.

Extremes of achievement are easier to identify than thresholds, with the rule of law as with baldness, but that there are thresholds and that they are valuable should not be controversial. This might be what Marmor is talking about, and anyway it is consistent with it, when he categorises the rule of law among those 'values or ideals that do not call, on their own grounds, for anything like full or perfect implementation. That is not because we must give up on their full implementation, but because such values, on their own grounds, set only a *rough* standard whereby gross deviations from it would be wrong.'[44] If the rule of law is such a value, unceasing cranking up of the clarity, certainty, consistency, etc., of legal provisions is not obviously the only way, nor the best, to deliver it. As a corollary, some diminution in these features is not necessarily the beginning of a slide into the abyss.

This simple truth was misunderstood even by Max Weber, who misunderstood little else. Yet he argued that since modern capitalism depended on predictablity, and

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43 See Friedrich von Hayek, *Law, Legislation and Liberty,* University of Chicago Press, Chicago, vols. 1-3, 1973, 1976, 1979; Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond Bourgeois Individualism. The Contemporary Crisis in Law and Legal Ideology' in Kamenka and R.S. Neale, eds., *Feudalism, Capitalism and Beyond,* (Edward Arnold, London, 1975, 126-44; Roberto Mangabeira Unger, *Law in Modern Society,* Free Press, New York, 1976.

44 'The Rule of Law and its Limits' (2004) 23 *Law and Philosophy,* 9

formal rational civil law promoted the greatest degree of predictability, capitalism must be most associated with the rise of modern capitalism; except, as in England and America, where it wasn't. Driven by the logic of 'the more the better', but chastened by facts he was too observant and too honest to deny, he was led to a series of *ad hoc* explanations of how Great Britain managed to do capitalism better than anywhere else with a highly 'irrational' legal system, compared, say, to the rationality of German law, which accompanied a less developed economy. These concessions were a tribute to his character and powers of observation, but not to this aspect of his social theory.[45]

For, as his contemporary Eugen Ehrlich[46] knew better than Weber, so much that promotes security of expectations is not the doing of formal legal institutions, but of what Ehrlich identified as the 'living law' that regulates the lives of communities for so much of the time. The interrelationships between official 'rules for decision', as Ehrlich called them, and 'living law' are complex and variable, but there is no reason believe that just ratcheting up the formal rationality of the former will produce its direct and faithful reflection in the latter.

This connects with the point I have been insisting on throughout this paper: the rule of law is ultimately about a social outcome, not a legal mechanism. The logic of the law is only one among the crucial sources of predictability in social life. Yet it is *social* predictability that ultimately matters, not just the formal institutional component of elite legal reasonings. A lot intervenes between the statute and the society and it may well be that these intervening variables outweigh, augment, distort, re-direct or otherwise affect the effects of law, in ways independent of the internal logic of the law or manner of legal reasoning. Given that achievement of the rule of law has this crucial sociological component, it will always be difficult for lawyers to say what its sources are, whether it is securely established and where threats to it might lie. Certainly there is no reason to believe that beyond attainment of an adequate threshold, more is always better.

4.2.3. Terror and counter-terror

On the other hand, instrumentalisation of law *can* threaten the rule of law, even when, perhaps especially when, it is done with genuinely good intentions. I have in mind the 'war on terror'. In its name, governments easily fall prey to the temptation to instrumentalise law and pare back the protections and foreknowledge that the rule of law seeks to guard. The justification for doing so, it might be said, stems from a dark side of the rule of law unobserved in sunnier times: it incapacitates effective prosecution of that harsh war. It demands gloves be donned, precisely when they need to come off.

The topic is too large to be dealt with in passing here, but several interrelated questions are key: should governments be constrained by rule of law considerations, in

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45 This argument is developed at greater length in my 'Ethical Positivism and the Liberalism of Fear,' in Tom Campbell and Jeffrey Goldsworthy, eds., *Judicial Power, Democracy and Legal Positivism,* Ashgate, Aldershot, 2000, 73-77. It gains further, even poignant, support from analyses then unknown to me that suggest the common law is superior to civil law in supporting economic growth. See Frank B. Cross, 'Identifying the Virtues of the Common Law' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=812464, and references cited there.

46 See his *Fundamental Principles of the Sociology of Law,* with introduction by Roscoe Pound and a new introduction by Klaus A. Ziegert, Transaction Publishers, New Jersey, first published in English 1936, and in German 1913.

fighting mortal and lethal enemies of both them and their populations? If so, what limits must a rule of law democracy observe in fighting terrorists, in order to remain true to its character, and to *justify* extreme measures if they need to be used? And what sorts of extreme measures might be justified? I don't propose to answer these questions here, but merely to suggest one consideration relevant to answering them. In particular, I want to emphasize the place of constraint in defence of a particular way of life, one in which many goods are possible and to which the rule of law is central.

'Terrorism', as the name implies, sows fear. But fear of what, precisely? That is an important question to get straight, since the answer to another question depends upon it. How should we respond? Many people emphasize fear of being killed. The right to life is so precious a thing, they suggest, that we should be prepared to tolerate incursions on other, presumably lesser rights, and also more broadly legal constraints on terror-fighters, to protect it. And certainly the right to life is precious. But on any actuarial scale, it is not the most conspicuous casualty of terror today, at least in the rich countries of the West and indeed in most countries threatened by terrorism. Compared to so many things that kill us, including simple car travel, terrorism is pretty low on the scale. It is horrible when it happens, and for its victims there can be little worse. However, the fears terror has generated dwarf the deaths it has caused.

Far greater than its threat to life, terrorism represents a threat to a *way* of life, particularly a *civil* way of life. For terrorism, while a crime against many things, is specifically a crime against civility. That is not the worst of it, but it is central.

A civil society is one in which it makes sense to assume that, even if you are not my friend, you need not therefore be my enemy. In such a society, unfamiliarity is not the same as hostility, a stranger is not assumed to be a threat, and chance encounters are not necessarily collisions, or anxiously expected to be. Civil engagements, even among strangers, are routine.

Such engagements don't happen naturally. They will only occur where they are made possible, lubricated, rendered unthreatening by various devices and protectors of civility, key among them the rule of law. The rule of law depends upon many such devices and protectors, both legal institutional and, as we have seen, more broadly traditions and mechanisms of public restraint, security, and commonly understood and respected rules of the game that both governors and governed routinely respect. Where effective, these diminish the likelihood of wilful, arbitrary, capricious uses and abuses of power, and it is precisely such uses and abuses that generate fear.

Terrorism assaults all this, deliberately and directly. The fear it sows is incompatible with civil relations among strangers. It is the enemy of many things and people, but quite specifically it is the enemy of civil society. Terror and civility cannot co-exist: where one thrives the other does not. So those committed to the possibility of civil society must oppose terror.

But how? Detailed answers are of course complex and variable. They depend on many judgments of principle, and particular assessments of the state of the world in which you live, the character of existing threats, their power, one's resources, and many other things.

One of our basic predicaments is that civility both is threatened by governments and depends upon them. This is the fundamental paradox of civil society: governments are potentially its greatest enemy, but they are also its indispensable condition and friend. Partisans of civil society have traditionally feared tyranny, despotism, arbitrary governments of all sorts, but they also have reason to fear ineffectual government. Residents of Iraq have known both, and have benefited from neither. We fear governments that ignore or abuse law, but we look to government to defend, which also means to respect, the rule of law.

The rule of law, as we have seen, is not a simple matter to ensure. Where governments are too weak, we will suffer at the hands of others; where too strong, at its hands. Civil society depends upon a government whose power is strong *and* limited at the same time. And strong in the right way *because* it acts within limits. This unavoidable paradox makes what governments do, at the same time critical and also a constant source of apprehension. And one thing must always be remembered. If civility is at stake, those who purport to defend it must themselves respect and nurture it, *and* its institutional preconditions. For what they do will affect it, often profoundly, for good and for ill. So they must ask themselves, of every measure they consider to oppose its enemies: how will it affect the civil texture of our social life. Otherwise it is easy – and in frightening circumstances often too easy – to forget, damage or even destroy precisely that which justifies the defence.

The point is well made by Neil MacCormick in a forthcoming book:

> When the way of life of civilized societies comes under threat, it is urgent for their citizens to reflect on the question what most matters in that threatened way of life. Erosion of the Rule of Law would not be a good way of warding off threats to civilization, but a way of yielding to them.[47]

4.2. *Harms through ...*

Still, the rule of law is never the only game in town. There are strong arguments that many of the other things we value, among them democracy and welfare, depend upon the securities that effective legality provides,[48] but there is no doubt that many things which we imagine we do for the sake of the rule of law come at the expense of tension with other values. Again there is nothing peculiar to the rule of law in this. For another truism about values is that they often conflict. Some, following Isaiah Berlin, believe such conflict to be a necessary attribute of values. Necessary or not, it is a common one. The rule of law is so precious a value that were tension to signal its demise, that should certainly give us pause. Since, however, that is not necessarily the case, the question is how much strain on the rule of law is tolerable, for the achievement of other goals to which we are also committed, or again, vice versa. As Raz comments, 'one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all, the rule of law is meant to enable the law to promote social good,

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47 *Rhetoric and the Rule of Law,* forthcoming Oxford University Press, 2005.

48 Cf. Guillermo O'Donnell, 'Why the Rule of Law Matters', (October 2004) 15, 4, *Journal of Democracy,* 32-46; Jürgen Habermas, *Between Facts and Norms,* trans. William Rehg, MIT Press, 1996.

and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.'[49]

But that is not the way everyone thinks. Now that the rule of law is so popular there is a tendency to treat it as a value to which all else should bend. However, in case of conflict with some other value, there is no reason *a priori* to imagine compromise on either or both is impossible or unattractive. That might turn out to be the case, but it needs to be established in a particular case, not assumed because tensions exist.

The reverse is also true. If one is strongly committed to some value other than rule of law, it is a mistake and at times a dangerous one, to decide that the importance of the competing value is such that the rule of law needs to be sacrificed. That sort of argument should never be accepted easily, and it can rarely be accepted without cost.

In the two examples below, other values are in danger of being compromised by too rigid devotion to the rule of law. In governmental reactions to terror, as we have seen, there is a tendency to reverse the direction of devotion. Either way, the consequences can be unfortunate.

4.2.1. Politics

Sometimes, enthusiasts for the rule of law simply ignore the possibility that their fervent commitment to it could conflict with anything important. Thus, in commenting on the alliance of anti-corruption campaigners with rule of law advocates, Krastev remarks that '[w]hat strikes one in this new rule of law orthodoxy are its formalistic and anti-political overtones. Rule of law is not portrayed as a society in which rules of the game are respected and the rights of the citizens are protected but as a set of institutional devices and capacity building programs that should free people from the imperfections of democratic politics.'[50] It remains, however, an open question in practice and an important one in principle whether legal imperialism serves the rule of law at all. It is certainly a question worth asking, whether it serves or may subvert other values to which we should also be committed.

Similar comments might be made about the enthusiasm for activist constitutional courts, common in the postcommunist region.[51] Throughout the region, at least among lawyers, it has been taken almost for granted, as though it goes without saying, that a strong and active constitutional court is essential, indeed central, for the rule of law. And this is not merely a local enthusiasm. Thus, many western writers believe that a strong, independent, separate, activist, constitutional court is an essential protector of constitutionalism, the rule of law, and liberal values more generally, virtually anywhere; the stronger the better 'to keep the political branches within constitutional bounds'. Some of them, indeed, believe that it is more democratic, in conditions of postcommunist

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49 'The Rule of Law and its Virtue,' in *The Authority of Law,* Clarendon Press, Oxford, 1979*,* 229.

50 Krastev, o*p. cit.,* 323-24.

51 An excellent and counter-majoritarian treatment of these courts, on which I have drawn here, is Wojciech Sadurski, *Rights before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe,* Springer, The Netherlands, 2005.

transition, than legislatures.[52] They applaud the first Hungarian Constitutional Court for its boldness, courage, 'vision' and so on, and are bored and disappointed with its successor for its lack of the same. They were unhappy that the pre-97 Polish Constitutional Tribunal could be overridden by a 2/3 majority in the *Sejm*, and are pleased now that its decision is final. They hold it against the Romanians that they are the only postcommunists who retain a legislative override. They are suspicious that governments will always tend to be 'overmighty' and rely on courts to cut them down to size.

There is another interpretation available, however, less heroic in its implications: that now as before we are witnessing at the top, a traditional distrust of the people and their representatives, and from below a long-lived regional 'culture of complaint' and reliance on 'experts'[53] To that can be added Wojciech Sadurski's importation and extension of the sophisticated arguments of western anti-counter-majoritarians into the post-communist context. Thus Sadurski is surprised that while post-communist constitutional courts have borrowed so much from their western counterparts, they have left the controversy behind. But why? What about the effects of such powerful courts on weak, newly emerging legislatures? What about their potential anaesthetizing effects on the population – leave it to the experts? What of the 'wars between the courts' that have gone on between the regular courts and the constitutional court in Poland and the Czech Republic? What of the extraordinary *power* of the Court, with its abstract power of review, given vague constitutional provisions and a willingness to mould them according to the judicial imagination or its special access to 'the invisible constitution'? What of the fact that such a court, exercising such a power, is arguably not really a court at all, not a third-party dispute settler, but another level of government? If so, by what right, with what democratic credentials? What of the incompetence of judges in deciding matters of complex social and economic policy? What of their designed political irresponsibility?

If one thought, as many of its supporters do but one need not, that an activist constitutional court was an essential or at least highly salutary feature of the rule of law, then on this view, democracy and the rule of law are in collision. This would be a case of harm directly through the rule of law.

Perhaps here too the rule of law is falsely blamed, since strong arguments can be made that the rule of law does not necessarily require activist constitutional courts, and on some 'ethical positivist' views[54] is actually inconsistent with them. On the other hand, on most understandings it requires courts, and in most constitutional arrangements, courts with final interpretive power. The classical question is thus always available to be

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52 See Kim Lane Scheppele, 'Democracy by Judiciary,' and Cindy Skach, 'Rethinking Judicial Review: Shaping the Toleration of Difference?' in Adam Czarnota, Martin Krygier and Wojciech Sadurski, eds., *op.cit.*

53 Even though the worry of critics is that judges' expertise does not exist beyond law, which has limited bearing on some of the more contentious and value-laden matters on which they have come to decide.

54 See Tom Campbell, *The Legal Theory of Ethical Positivism,* Aldershot, Dartmouth, 1996. Ethical positivists believe that whether or not the law *is* distinct from morals, we do better if it is treated as though it were. Amng the targets of ethical positivists' ire are activist courts, which, so the argument goes, infuse their purportedly legal judgments with moral or other views drawn from outside the law.

recalled in these circumstances: *quis custodiet custodies?* Since the answer usually is other judges, this worries some democrats a good deal. They note that 'the displacement of the political by the juridical ... has become common throughout the advanced democracies, especially since World War II'.[55] They worry that this is intrinsically *un*democratic, for the usual countermajoritarian reasons, augmented by the increasing judicial role. Maravall also worries that courts, even independent, though not impartial courts can be actively *anti*-democratic, as he argues was true of courts under Nazism, and in Chile under Allende and then (in a different direction) under Pinochet, and that politicians can turn 'the independence of judges into an instrument for judicializing politics', as again he argues was the case in Spain after the fall of the dictatorship. His argument is made easier by his adoption of a 'thin' institutional definition of rule of law. It would be harder to say that independent but partial judges are consistent with the values that animate the rule of law, but if they are not, then this is an example not of abuse that flows from the intrinsic character of the rule of law, but from a false pretence to it. But however that argument fares, the space for tension between political democracy and the rule of law is unlikely to vanish.

4.2.2. Transitional Justice

A major issue confronting all post-dictatorships is what to do about unsavoury pasts. Of course one can do nothing, though as the Poles learnt after their post-communist attempt to draw a 'thick line' between present and past, pressures mount. But if you try to do much, you will sooner or later run up against constraints that are thought, rightly or wrongly, to stem from the rule of law. This can lead people in a variety of directions. On one side, one can fret that the rule of law stands in the way of justice; on the other, one can recommend lowering one's sights, since 'the following dilemma is evident: The maximum that can possibly be done within the constraints of rule of law and non-retroactivity is still way below the minimum that would have to be done in order to satisfy the small but vocal groups of those who have suffered most under the old regime.'[56]

One central aspect of the rule of law that bedevils matters of transitional justice, as mentioned by Offe and Poppe, is the problem of retroactivity, which for the rule of law is no small problem, and is a real worry to many lawyers in 'transitional times.' On the one hand, retroactive laws are usually regarded as a thorn in the side of the rule of law everywhere, because one cannot know a law which only comes to exist later. That is as true in normal as it is in transitional times. On the other hand, successors to dictators often yearn to remedy flagrant past wrongs, some of them committed by or in the name of law. The problem has, therefore, a special poignancy in post-dictatorships, though it is not unique to them.

But to acknowledge that retroactivity is a problem is not yet to determine what to do about it. However, when the Hungarian Constitutional Court confronted a communist statute of limitations, which protected perpetrators of crimes in 1956 who had been

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55 John Ferejohn and Pasquale Pasquino, 'Rule of Democracy and the Rule of Law', in Maravall and Przeworski, eds., *op.cit.,* 248.

56 Claus Offe and Ulrike Poppe, 'Transitional Justice after the Breakdown of the German Democratic Republic', in Czarnota, Krygier, Sadurski, eds., *Rethinking the Rule of Law after Communism,* 181.

shielded from prosecution under communism since they had acted on behalf of the communist government, it had no doubt what the rule of law required. The Hungarian democratic government had attempt to lift the statute of limitations for crimes not prosecuted in the previous regime, but were rebuffed by a unanimous Constitutional Court. According to the Court:

> The basic guarantees of the rule of law cannot be set aside by reference to historical situations and to justice as a requirement of the state under the rule of law. A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice.[57]

These conclusions are not self-evident. There are many circumstances where one or other of even the basic standards of the rule of law is deliberately bent or even violated in a healthy rule-of-law order for good reasons, either to correct failures on other dimensions or to serve other values, such as sensitivity to particulars or flexibility or even to enhance the overall morality of the law. In such circumstances, and they are scarcely rare, trade-offs have to be contemplated.[58] Such trades should be examined carefully, but they cannot be rejected out of hand, since there is never just one thing we need from law. A legal order and even an individual law can be clear *enough,* accessible *enough,* stable *enough* etc., without all its laws being perfectly clear or perfectly accessible or stable.

Again, the *point* of these standards needs to be kept in mind, not merely the standards themselves. If we do so, we can see, as Lon Fuller stresses, that these standards are not each to be treated as separate and inviolate. Rather,

> [they] do not lend themselves to anything like separate and categorical statement. All of them are means toward a single end, and under varying circumstances the optimum marshalling of these means may change. Thus an inadvertent departure from one desideratum may require a compensating departure from another; this is the case where a failure to give adequate publicity to a new requirement of form may demand for its cure a retrospective statute. At other times, a neglect of one desideratum may throw an added burden on another; thus, where laws change frequently, the requirement of publicity becomes increasingly stringent. In other words, under varying circumstances the elements of legality must be combined and recombined in accordance with something like an economic calculation that will suit them to the instant case.[59]

This last point is rarely made, but it is crucial to make. Instituting the rule of law requires *judgment* with an eye to its purposes. It is not the mechanical application of an imported and inviolable set of rules.

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57 Decision 11/1992: 5 March 1992, translated and reprinted in László Sólyom and Georg Brunner, eds., *Constitutiona Judiciary in a New Democracy. The Hungarian Constitutional Court,* University of Michigan Press, Ann Arbor, 2000, 221.

58 On all this, see Lon Fuller, *The Morality of Law* and Philip Selznick, *The Moral Commonwealth,* (Berkeley: University of California Press, 1992) 335, 464.

59 L. Fuller, *op. cit.,* 104.

Fuller sees law as 'purposive activity attended by certain difficulties that it must surmount if it is to succeed in attaining its ends.'[60] The difficulties will vary, and so too, therefore, will the best ways to meet them. In relation to retroactive laws Fuller observes:

> Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. …
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> If … we are to appraise retroactive laws intelligently, we must place them in the context of a system of rules that are generally prospective. Curiously, in this context situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality. Like every other human undertaking, the effort to meet the often complex demands of the internal morality of law [the rule of law] may suffer various kinds of shipwreck. It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn to pick up the pieces".[61]

Many legal polemicists reach for their revolvers as soon as they hear advocacy of retroactive laws. Fuller, one of the most perceptive partisans of the rule of law, takes them in his stride. Had he lived to see post-communism, he is unlikely to have thought that his writings had lost their purchase on the situation because new things were happening. On the contrary, I can imagine him saying that these new things could only be done wisely if we kept a firm handle on what they were being done for, and were prepared to be flexible about how to do them. This is not to say the Hungarian Court was necessarily wrong in denying validity to a retroactive law. The issue is arguable (and was indeed argued to opposite effect by the Czech Constitutional Tribunal). However, rhetorical brandishing of the rule of law as a conversation-stopper is not a move that commends itself.

5. Misuse

If misuse is to be distinguished from what I earlier described as masquerade, something more than *talk* of the rule of law must be involved. Something intrinsic to the rule of law must be susceptible to misuse. How could that be, if, as I believe, the rule of law is a necessary condition for a good society?

5.1. Interpretive absolutism.

One common way is to treat one tendentious interpretation of the rule of law, or some element of it, as the only authentic one, to be maximised and secured at the expense of any other, even arguable, interpretation, or any other, if competing, value. Treated as an ideal or a cluster of ideals, the rule of law is obviously subject to interpretation. What best reduces legal arbitrariness in particular circumstances will be a question on which people differ. They differ on what counts as arbitrary, what institutions are good for reducing arbitrariness, and how they should behave. There is nothing unusual in this, it is

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60 *Ibid.*, 117.

61 *Ibid.*, p. 53

the way of most ideals. Nor is it unusual that the rule of law can conflict with other things we value. So to point to an interpretation of the rule of law different from one's own, or to a tension between it (or an interpretation of it) and another value is not of itself to point to misuse. On the other hand, failure to acknowledge that one's interpretation is an arguable choice, or that it is possible to deal or live with tensions between it and other values, might amount to misuse. Maximalist boosting of 'legal certainty' as against 'enough to go on' or 'in (even uneasy) combination with considerations of justice' may well constitute a misuse of this kind.

This is so, for reasons already mentioned in 2.1. above: among them, that the rule of law does not call for 'full implementation' (whatever that might mean), and the more you have of what you imagine to be its elements is not necessarily the better. And a society is particularly likely to suffer from such absolutisation where interests are differentially served by an emphasis on one interpretation or one value, to the exclusion of others. Very quickly, for some, too much of a good thing can become a thoroughly bad thing. The point can be illustrated by some remarks of Philip Selznick on legal positivism which could be reworded without loss as applying to formalistic conceptions of the rule of law:

> Positivism is not indifferent to legal values. On the contrary, from positivism we gain a steady focus on *clarity, certainty,* and institutional *autonomy.* These virtues serve the ends of justice. They uphold the expectations of citizens, limit the abuse of official discretion, and determine the reach of binding obligations. By insisting on a definite boundary between the legal and the nonlegal, they sustaiin the independence of judges and the separation of law from politics. They thereby enhance, in some respects at least, the integrity of legal institutions ....
>
> The truth in legal positivism is, however, a limited truth. The virtues of clarity, certainty, and institutional autonomy are contingent, not absolute. They do not always serve justice; indeed, they often get in its way. Precise rules, accurate facts, and uniform administration are elements of *formal* justice, which equalizes parties, restrains partiality, and makes decisions predictable. These surely contribute to the mitigation of arbitrary rule. But legal "correctness" has its own costs. Like any other technology, it is vulnerable to the divorce of ends and means. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of law. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system either to take new interests and circumstances into account or to remedy the effects of social inequality. Formal justice tends to serve the status quo. It therefore may be experienced as arbitrary by those whose interests are only dimly perceived or who are really outside the "system".[62]

The virtues of the rule of law, I believe, are undeniable. So too is its complexity. To deny either is folly, and to deny the latter in favour of some absolutist or exclusivist interpretation of it or part of it, is likely to amount or lead to abuse. Particularly when the result is that some interests will be systematically better served this way than others.

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62 *The Moral Commonwealth,* 436-37.

5.2. Economism versus Kantianism

If in the first form of abuse, an exaggerated formulation of a partial virtue is taken for the whole, in this second form, a value of wide applicability is bestowed only on some that it could help. It was an insight of Max Weber's that the same outcome can be of interest to many different social types. Thus he pointed out that in early modern Europe, rulers had an interest in the predictability of law, as did the rising bourgeoisie, as too did some agitators for the Rights of Man. That is to say, their interests differed and at times were in stark conflict, but some particular features of the law served them all. But what if only some of those interests get this generalised benefit?

In a great deal of rule of law discussion, the focus is on its relationship to economic development. It is explained, as Weber well understood, that modern economic relations depend on a stable predictable legal order, as they do. And so it is easy to find arguments for the rule of law that stress 'the contribution that appropriate legislation makes to private investment and, supposedly, ultimately to economic growth.'[63] But if that contribution governs one's interest in the law, not everyone will gain. Rather, as O'Donnell writes of Latin America and one can speculate applies more broadly:

> in the present context of Latin America, the type of justification of the rule of law one prefers is likely to make a significant difference in terms of the policies that might be advocated. In particular, there is the danger derived from the fact that nowadays legal and judicial reforms (and the international and domestic funding allocated to support them) are strongly oriented toward the perceived interests of the dominant sectors (basically domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law). This may be useful for fomenting investment, but it tends to produce a "dualistic development of the justice system," centered on those aspects "that concern the modnernizing sectors of the economic elite in matters of an economic, business or financial nature ... [while] other areas of litigation and access to justice remain untouched, corrupted and persistently lacking in infrastructrue and resources." For societies that are profoundly unequal, these trends may very well reinforce the exclusion of many from the rule of law, while further exaggerating the advantages that the privileged enjoy by means of laws and courts enhanced in their direct interest.[64]

O'Donnell prefers to ground the justification of the rule of law, not in its economic contribution which he neither denies nor condemns, but in 'the formal but not insignificant equality entailed by the attribution to legal persons of autonomous and responsible agency'. Unless one follows him in that, some kind of systematic partiality is likely to follow.

5.3. Der Doppelstaat

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63 Guillermo O'Donnell, 'Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion', in Juan E. Méndez, Guillermo O'Donnell and eds., *The (Un)Rule of Law and the Underprivileged in Latin America,* University of Notre Dame Press, Notre Dame, Indiana, 1998,

64 *Ibid.,* 319-20, quoting Pilar Domingo Villegas, 'The Judiciary and Democratization in Latin America'.

Another, even more sinister, form of partiality can be found in what Ernst Fraenkel called a 'Dual State', dual for it includes both domains ruled by a 'normative' component and others subject to unrestrained exercise of 'prerogative'.[65] In the former 'an administrative body endowed with elaborate powers for safeguarding the legal order,' governs some classes, races or domains. In the latter 'unlimited violence unchecked by any legal guarantees' is wielded over other classes, races, or everyone in other domains (e.g. politics). In such orders, the 'prerogative state' has the final word, though the regime might often find it useful to allow the normative state to operate routinely in particular areas of life. Here the rule of law is not necessarily a mere ruse, or masquerade, but real relationships are really governed by it, subject to the looming prerogative, and restricted to the favoured groups. Nazi Germany was Fraenkel's example; South Africa under *Apartheid* a more recent one. Here the 'normative' sphere can even lend bogus legitimacy to the whole, though it does not apply to deliberately selected parts of it and can at any time be taken away from it. Again, O'Donnell's advice on the proper grounds to support the rule of law need to be heeded, but are not.

5.4. Colonialism

There are images of colonialism as scenes of unqualified and unmediated, lawless, repression. Doubtless such colonies existed, and where they did the rule of law did not. But not every colony was like that, and the colony which became the nation where I was born was not of that sort. On the contrary, as I have argued elsewhere, though its first European settlers were convicts they were furnished with and protected to a remarkable degree by the constraints of the rule of law. The indigenous inhabitants of the country were not so protected, but the reasons for that were complex. Elsewhere, I have summarised some of the features of that condition.[66] Here I will just seek to to extract three somewhat, but not altogether, speculative generalisations from them.

First, and for a long time, a colonial power in a large country, whatever its laws and its ambitions in relation to them, will be unlikely to be able, even if it wished, to restrain its colonists as they spread out into the frontier. These colonists, unrestrained, are unlikely to favour the values and conditions of the rule of law in their dealings with natives, at least where interests compete, which they will often do. That will be so, even when the intentions of the lawmakers are altogether honourable.

Second, as the colonial power firms, the government might be able to enforce its laws and it is possible that it will seek to abide by what it understands to be the constraints of the rule of law, in the actions of its officials, courts, police, and so on. (On the other hand, it might make special laws for indigenes which, whether or not well intentioned, commonly deprive them of many of the assumptions and benefits associated with the rule of law.) But one then confronts the predicament that the rule of law presupposes a lot *sociologically* to be effective and a lot to be good. In early contact with Aboriginal society its presuppositions rarely can exist even were there a will to adhere to it. And often that does not exist either.

Third and most unsettling is that 'it is hard to see how a will more concerned to bring the rule of law could have done much to alter the tragedy that became the

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65 *The Dual State,* trans. E.A.Shils*, et al,* Oxford University Press, New York, 1941, xiii .

66 See 'The Grammar of Colonial Legality ...' n.1 *supra.*

Aboriginal story in my country [and many countries] .... Indeed, ... in the light of the relative impotence of the imposed law for much of the century, the rule of law more likely ... justified, mythologised, and may well have blinded the perpetrators to the horror of relationships of domination and exploitation out of which, systematically and unavoidably, there could be only one set of winners.'[67] To the extent that it did so, one might say that it was abused, at times terribly abused, as were its indigenous subjects.

6. Conclusion

As a partisan of the rule of law, I have found some discomfort in exploring ways it might lend itself to abuse. Perhaps that is why I have sought to distinguish abuses in which it is complicit from those where it is, as it were, defamed. I have not wanted to fuel the defamation. And yet the rule of law can be abused in the ways discussed, and doubtless many more, especially if one forgets what one wants the rule of law *for*. Of course, as the other chapters in this book make plain, so can many other good things, among them fundamental rights. And perhaps that is a tribute to their virtue too, this time not hypocritical: Nazism cannot be abused in the same way; it is of its nature, ontologically as it were, evil. The only way to abuse it would be to turn it to good purposes, but there is no chance of that. The rule of law, on the other hand, is a deeply good thing, perhaps no longer 'unqualified', as E.P. Thompson thought, but good nevertheless. If it needs abuse to make it bad, that speaks well of it, though not so well that such abuse should be encouraged.

Law School
University of New South Wales
Sydney 2052
New South Wales
Australia
m.krygier@unsw.edu.au

Center for Advanced Study in the Behavioral Sciences
75 Alta Road
Stanford
CA. 94305
USA
krygier@casbs.stanford.edu

[67] 'False Dichotomies, Real Perplexities, and the Rule of Law', *op. cit.,* 276-77.